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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 834

SAM ACHILLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
(a) Opinion of the District Court	2
(b) Jurisdiction	2
(c) Questions Presented for Review	2
(d) Statutes Involved	3
(e) Statement of the Case	4
(g) Reasons for Granting the Writ	5
Conclusion	10
Appendix:	
Memorandum Opinion of United States District Court	11

TABLE OF CASES CITED.

Beacon Brass Co., United States v., 344 U. S. 43, 45 . . . 7

Berra v. United States, 351 U. S. 131 . . . 6, 7, 8

Blockburger v. United States, 284 U. S. 299 . . . 7

Costello v. United States, Docket 666 . . . 6, 7

Evans, United States v., 333 U. S. 483 . . . 8

Fair Lawn Service Center, State v., (1956) 20 N. J. 468, 120 A. (2) 233 . . . 9

Gavieres v. United States, 220 U. S. 338 . . . 7

Holmes v. United States (C. A. 5, 1920), 267 F. 529, cert. den. 254 U. S. 640 . . . 9

Noveck, United States v., 273 U. S. 202 . . . 7

Pereira v. United States, 347 U. S. 1 . . . 7

Pollard v. United States, Docket 38 . . . 5

Rosenberg v. United States, 346 U. S. 273 . . . 7

Smith v. United States (C. A. 10, 1944), 145 F. 2d 643, cert. den. 323 U. S. 803 . . . 9

Other Authorities Cited.

Federal Rules of Criminal Procedure,
Rules 35 and 52(b) 6

Internal Revenue Code of 1939,
Sections 145(b) and 3616(a), 26 U. S. C. 145(b) and 3616(a) 1, 2, 3, 4, 5, 6, 7, 8

28 U. S. C. 1254(1) 2

28 U. S. C. 2255 6

18 U. S. C. A. 87, 88 9

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit prior to the entry of judgment by that Court upon an appeal there pending from an order of the United States District Court for the Northern District of Illinois, Eastern Division, on petitioner's motion for a correction of his sentence after conviction for filing false income tax returns with intent to evade taxes.

On March 4, 1957, this Court vacated its prior order in this cause (Docket 430) of November 19, 1956, denying a

petition for writ of certiorari to the Court of Appeals for the Seventh Circuit, and the petition was granted, limited to the question of whether petitioner could be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also showed a violation of Section 3616(a) of the Internal Revenue Code of 1939.

Petitioner therefore respectfully asks this Court to issue the writ of certiorari for the purpose of bringing before the Court the entire record of the proceedings had subsequent to November 19, 1956.

(a) Opinion of the District Court.

The opinion of the District Court, not yet reported, appears in Appendix A.

(b) Jurisdiction.

1. The order of the District Court denying motion to correct and granting motion to reduce sentence was entered December 27, 1956, and the Court's memorandum filed January 2, 1957.

2. After notice of appeal and an amended notice of appeal, filed January 7, 1957, the record was filed in the Court of Appeals for the Seventh Circuit on February 8, 1957 and the appeal was perfected on that day.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

(c) Questions Presented for Review.

1. May a person be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also show a violation of Section 3616(a) of the Internal Revenue Code of 1939?

2. Does the overlap of Sections 145(b) and 3616(a) of the Internal Revenue Code pose an inconsistency so great as to preclude any valid sentence whatsoever?

This latter question was made explicit in the supplementary motion filed in the Court of Appeals.

(d) Statutes Involved.

Internal Revenue Code 1939, Title 26, U. S. C. (1939):

§ 145. Penalties—

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

§ 3616. Penalties—

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(e) Statement of the Case.

Petitioner was indicted on three counts charging that he "did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" in violation of Section 145(b) of the Internal Revenue Code (3-4).[1]

Two trials were had, the first resulting in a mistrial ordered by the District Court on motion of the defendant (42). The second trial resulted in a conviction on all three counts involving the calendar years 1946, 1947 and 1948. The petitioner was sentenced to two years imprisonment on each count, to run concurrently, and to pay a fine of $2,000 on each count, the fines to be cumulative, or a total of $6,000.

On June 5, 1956, the United States Court of Appeals for the Seventh Circuit reversed the judgment of conviction on the first count and affirmed judgment of conviction on the second and third counts.[2] A petition for rehearing was filed and denied.[3]

This Court on November 19, 1956 denied certiorari, and the matter came on before the District Court for sentencing under the mandate of the Court of Appeals.

On November 26, 1956, then counsel for petitioner moved the District Court for the entry of an order for leave to file a motion and petition to correct or reduce the sentence, relying partly upon the overlap of Sections 145(b) and 3616(a) of the 1939 Code.

1. Parenthetical references, unless otherwise indicated, are to the appendix in the Court of Appeals, filed with this Court as Docket 430.

2. App.-1 to petition for certiorari in Docket 430, 234 F. 2d 797.

3. App.-17 to petition for certiorari in Docket 430.

On December 27, 1956, the District Court denied the motion to correct the sentence, but reduced the sentence to one year under counts 2 and 3 of the indictment, to run concurrently, and fined the petitioner $1,000 on each count, or a total of $2,000. While the District Court purported to deny the motion to correct the sentence on the ground of inconsistency between Sections 145(b) and 3616(a) of the Code, the Court stated, "I also feel that a sentence of this kind will ultimately do as much good as the former sentence under the felony counts would have done."[4]

Thereafter, counsel for petitioner moved in the Court of Appeals to enlarge the grounds for correction of sentence by raising the issue of the validity of any sentence in view of the conflict between Sections 145(b) and 3616(a) of the Code. Question 2 as set forth in the Questions Presented by this petition falls within the scope of that motion. The Court of Appeals denied the motion to enlarge.

(g) Reasons for Granting the Writ.

The trial court refused to resolve the questions necessarily presented by the overlap of Sections 145(b) and 3616(a), stating, "That matter has never been finally adjudicated by our Supreme Court. I can conceive that there is quite a diversity of opinion on that question. I

4. Page 20, transcript of record filed with this petition. This seemingly inconsistent action of the District Court reducing the sentence to a misdemeanor level does not render the case moot. There is still left the implication that sentence was imposed under the felony counts. As this Court most recently stated on February 25, 1957, in *Thomas E. Pollard* v. *United States*, Docket 38, this Term, "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." Here, as in the *Pollard* case, the petitioner is challenging the legality, not of any determination of guilt, but instead, of the sentence imposed.

am, therefore, taking that into consideration in my final judgment in this case.'"[5]

There is thus left open for decision an important question of federal criminal law. This Court on January 28, 1957 granted certiorari in the *Frank Costello* case, Docket 666, which presents the identical issue set out in Question 1 of the Questions Presented by this petition. Subsequently, on March 4, 1957, this Court vacated its prior denial of certiorari in this cause, Docket 430, and granted the writ, limited to the question set out in Question 1 of the Questions Presented by this petition. Accordingly, the allowance of the writ in this petition will bring before this Court the full record of the proceedings had subsequent to November 19, 1956.

We respectfully submit that both the District Court and the Court of Appeals misconceived the implications of this Court's decision in *Berra* v. *United States*, 351 U. S. 131. That case did not involve the direct question as to the validity of a sentence under Section 145(b), or the validity of a sentence under either Sections 145(b) or 3616(a). These questions were appropriately raised in the District Court and in the Court of Appeals by motions under Rules 35 and 52(b) of the Federal Rules of Criminal Procedure. These motions are the equivalent of a motion presented under Section 2255, Title 28 U. S. C., where the prisoner is in custody. The question thus left open for decision in the *Berra* case is raised by this petition.

In the Government's memorandum, in which it did not oppose the granting of the petition for certiorari in the *Frank Costello* case (Docket 666), it is admitted that the filing of a false and fraudulent return with intent to evade tax is made both a felony and a misdemenor in the 1939 Revenue Code. The Government also states that, "indeed,

5. Page 19, transcript of record filed with this petition.

[in] almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return, is identical with that required to prove that he filed a false return with intent to evade taxes in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap.'"[6]

Where, as it is admitted here, Congress has proscribed a course of conduct by two separate sections of the same statute but has imposed different penalties, and the proof required in each case is identical, petitioner asserts that the section imposing the lesser penalty must control. *Rosenberg* v. *United States*, 346 U. S. 273, 312. This Court has stated that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304. And, of course, "where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *United States* v. *Noveck*, 273 U. S. 202; *Gavieres* v. *United States*, 220 U. S. 338; *Pereira* v. *United States*, 347 U. S. 1.

In *Berra* v. *United States*, 351 U. S. 131, 134, this Court specifically held that "it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return, § 145(b), were identical with those required to prove that he delivered a false return with 'intent' to evade taxes, § 3616(a). In this instance §§ 145(b) and 3616(a) covered precisely the same ground."

In that situation, neither the district attorney nor the Attorney General has the power to select the particular statute under which a person shall be prosecuted, either for a felony or for a misdemeanor.

6. Page 2, Memorandum for the United States, *Frank Costello* v. *United States*, Docket 666, this Term.

This was pointed out by Mr. Justice Black, with whom Mr. Justice Douglas joined, dissenting in the *Berra* case, 351 U. S. 131, 139. And in *Rosenberg* v. *United States*, 346 U. S. 273, 306, Mr. Justice Frankfurter decisively limited the roll of a prosecutor when he said,

> "... it cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole conception of impersonality in the criminal law, would be an exercise in self-stultification. The indorsement of an indictment, the theory under which the prosecutor is operating, his belief or error as to the statute which supports an indictment or under which sentences may be imposed, are all wholly immaterial. *Williams* v. *United States*, 168 U. S. 382, 389, 18 S. Ct. 92, 94, 42 L. Ed. 509."

As to the petitioner's second contention, that the overlap of Sections 145(b) and 3616(a) of the Code present an inconsistency so great as to preclude any valid sentence whatsoever, the question arises as to whether or not the Congress has sufficiently exercised its constitutional power to declare criminal penalties. Does the conflict between these sections present simply a question of judicial interpretation, or does it go beyond the scope of interpretation and present a situation such as this Court was confronted with in *United States* v. *Evans*, 333 U. S. 483. There, this Court refused to invade the legislative function, and, in effect, fix the penalty by a process of speculation as to the penalty Congress there intended. The Court stated:

> "The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government

asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all."

The statement is broadly made in *Holmes* v. *United States*, (CA 5, 1920), 267 F. 529, 531, cert. den. 254 U. S. 640, that, "In a criminal statute the citizen must not be left in uncertainty or to speculation or argument as to what acts constitute a violation, or what punishment, if any, is visited upon a violation when the terms are definite."

This statement of the rule is repeated in *Smith* v. *United States* (CA 10, 1944), 145 F. 2d 643, 644, cert. den. 323 U. S. 803. The Court there said, "A criminal statute must be definite and certain in respect to the punishment it is intended to impose. (Citing cases.) And a statute which, by reference to another, leaves the sentencing in doubt as to the punishment it may impose for the described offense, is void and inoperative." See also, *State* v. *Fair Lawn Service Center* (1956), 20 N. J. 468, 120 A. (2) 233.

Both the *Smith* and *Holmes* decisions were concerned with Sections 35 and 36 of the Criminal Code. (Secs. 87, 88, Title 18 U. S. C. A.). A violation of one of these sections provided that the punishment should be that provided in the other section. However, the section to which reference was made contained alternative punishment, depending upon the seriousness of the offense.

Much the same situation is presented by this petition. The Court is left to conjecture as to which of the alternative punishments Congress intended for the identical offense.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 9, 1957.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA,
vs.
SAM ACHILLI. } No. 53 CR 154

MEMORANDUM.

This matter came on to be heard on motion to correct and on motion to reduce the sentence heretofore imposed herein.

The Court has had the benefit of argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited, has reviewed the entire record in this matter and is fully advised in the premises.

The Court has weighed the arguments advanced in support of the motion to correct which is based on the theory that the indictment in effect charges not felonies but misdemeanors only. The point has never been finally adjudicated by the United States Supreme Court and there would appear to be a diversity of opinion concerning it.

It is the considered opinion of this Court that there is insufficient basis here to warrant granting a motion to correct, and motion to correct has accordingly been denied.

With respect to the motion for reduction of sentence, the Court has given very thorough attention to every conceiv-

able aspect of this matter, among others, the fact that there has been a reversal by the Court of Appeals for the Seventh Circuit with respect to the First Count which involved nonpayment of a sizable tax sum, now eliminated from this case; and giving the defendant the benefit of every doubt, this Court's own belief that a sentence of the kind now imposed will ultimately serve the same good purpose as the former sentence herein.

Therefore, a sentence has been imposed for a period of one year under the Second Count of the indictment together with a fine of $1,000, and one year under the Third Count of the indictment together with a fine of $1,000, unless sooner released by due process of law, the sentence under the Third Count to run concurrently with that under the Second Count, and the fines to be cumulative, or in the total sum of $2,000.

It is hardly necessary to say that the Court has devoted a great deal of time and thought to this case over the last two years, and, with studied reflection on the long road we have traveled, it is my present conviction that this determination represents a sound and proper disposition of the case, and that the ends of justice have been met.

/s/ Wm G. Knoch.

Date: January 2, 1957.